

Deedee: Hi I'm Deedee Doke, Editor of *Recruiter* magazine and recruiter.co.uk. Welcome to our first episode of *Recruiter Reveals All*, our podcast where we'll get the latest thinking on issues events and trends in the recruitment sector. This edition is sponsored by IR35 Shield and this time we're joined by Dave Chaplin CEO of Contract A Calculator and IR35 Shield to talk about, what else? IR35 - now said to take effect in April 21 after a very long battle to review its impact to date and delay the applications to the private sector. But before we deep dive into IR35 let's get to know Dave with a 60 second round of quickfire questions. Dave – What's your favourite pizza topping?

Dave: Something spicy

Deedee: What TV series got you through lockdown?

Dave: I haven't really watched much TV for the past two years so I think the TV series I mostly watched is a series called Parliament TV

Deedee: I wonder why! What business did you most want to see re-open in your neighbourhood and why?

Dave: Probably the pub because once a month, me and my friends we will go down there, sort of last Friday club, so we haven't been able to do that

Deedee: Which sport did you miss most this past spring?

Dave: I don't really play much sport myself other than snooker, some people don't think that's a real sport, I think on the TV probably the golf, the Masters! I enjoy watching that every year

Deedee: And finally, if IR35 had a theme song, what would it be?

Dave: I thought about this, and I think the answer is roller coaster. That's certainly what it has been for the last four years, lobbying against people.

Deedee: Yes, well for those who don't know IR35 is the legislation we love to hate and now it looks as though there is no stopping it, it is going to be put into effect in April 2021. Dave what were your first thoughts when you first heard the results of the latest vote?

Dave: Yes, that was a week before last, in the House of Commons. Obviously very deflated because we spent so much time getting to the point where we could even get a vote – when they announced that there was a division, at that point we didn't know what the result would be, we thought we had it in the bag, so it was surprising. Yeah just very disappointing really

Deedee: Take us behind the scenes at Westminster, tell us the back story of what machination was going on insuring that IR35 had to go into force next year

Dave: Well the Treasury and HMRC effectively the same thing really. They were publishing all their information trying to convince MP's to vote for it, and I guess it's our job to try and convince the MP's not to vote for this, or to change the finance bill essentially so that it would be delayed further because it should really be delayed a couple of years. None of us are really in the situation where they need this right now. Everyone is recovering from COVID. So, we thought we were in the position, after 4000 of our campaigners had been speaking to our MPs, we had almost 40, if not more than 40 which is what we would have needed, 40 rebel Tory MP's to then win the vote. In the morning Labour weren't on side, that took quite some doing with lots of lobbying going on there for them to agree to the amendment which was to delay for two years and they got on board because they're unhappy with the whole issue of zero rights employment that seems to accompany this particular piece of legislation. So yeah it was last day really.

Deedee: Wow, and after all that work, roughly, building on that just a bit, how many years have you been working on trying to get Parliament to see some reason around these off-payroll rules?

Dave: I mean I've been working on this probably for 20 years, this particular campaign has been four years, so I think I would say as a starting point was in 2016 when they were proposing to introduce these rules into the public sector, so we weren't campaigning as hard then. Lots of people were, and I was staggered that it went into the public sector, the backlash was so fierce, I'm amazed that we even went ahead with it then. At that point it was a case of people thought it would be a case of when and not if. So, we continue to campaign, we did lots of investigative journalism. We really did help spread the message actually that these reforms are a very very bad idea. So, I guess yeah we've been doing it for four years and it finally came to a head on that final vote I'm amazed actually it even got support that we got to vote considering essentially the small number of campaigner that we had

Deedee: Well what is going to happen between now and next April?

Dave: From a legislation point of view, probably nothing. In the next few days it will be discussed I believe in the House of Lords but that would just be a discussion - they don't have any powers so we can expect the legislation itself to reach and more or less sent and be in the finance bill and then that's it, you can't change primary legislation but what we have seen, again, more from what was going on behind the scenes and feedback we've had from MPs, to our campaigners, was lots of robust discussions shall we say between MP's and Treasury leading up to that vote whereby HMRC and Treasury gave those MPs lot of reassurances. We understand that Boris Johnson personally intervened as well, to try and get the vote through parliament, again giving people reassurances. So something's happened whereby they have said make sure this isn't damaging to the flexible workforce, so we would hope to see that there is better education for the HMRC so that firms aren't so fearful. I think historically they've just liked to scare everyone into putting everyone on payroll, which is not good for UK PLC.

Deedee: Well in addition to educating people do you see anything that can be done to make this legislation a bit more, maybe not sympathetic, but a little bit more complimentary to the flexible professional workforce that we are so proud of in the UK

Dave: I think if the treasury and HMRC were more complementary about flexible workforce, if perhaps if they provided guidance that said 'actually if you want to hire someone like this then this is what you will probably need to do'. That would be useful, they don't tend to do that because they're just trying to get as many people as possible on payroll. By looking at the government's response to the North's report, and I saw a copy of that today, it came out today.

There does look like there is intention, probably just part of the assurances, there does look like there is going to be some intention from HMRC to educate businesses much better. What that means? We don't know. You know you could ask me do I trust them to actually come out with anything different? The answer would be no! I'm sorry if I sound cynical but that's because I am. We've seen it all before really, but they really did get a verbal kicking from the MP's this time so it remains that it's not particularly difficult to hire contractors compliantly and not have to worry about this reform but they just need to be educated and unfortunately HMRC aren't providing the education on how they can do it. They're just trying to scare them to get them on the payroll. So, we all need to do our bit to help clients realise that this doesn't have to be a scary as perhaps they might think it is.

Deedee: Well one point on the HMRC, along with all this, you have been very vocal, with other people about what you perceive as the inadequacies of the CEST tool that HMRC intended for people to use to see if they were inside or outside of IR35. What's the state of play with that?

Dave: So that's the CEST tool, that stands for Check Employment Status for Tax, it's had a few iterations, I mean obviously going to be biased on this because we we've been developing status tools for the near on 10 years now. But we FOI'd them to death on the CEST tool, they don't have any evidence that demonstrates it gives the right answers, there's lots of evidence that shows that it doesn't give the right answers.

Essentially if a firm uses CEST, it will probably tell them that everyone needs to go and payroll, and if it doesn't then by the nature of its underlying algorithm, particularly if they rely on substitution, getting a bit technical sorry! But I think it would be dangerous for a firm to rely on an outside termination from CEST because as we've seen in the courts, HMRC just ignore it, they did in the case we descended to help you figure out consulting, they just ignored any CEST results and said they weren't relevant. I'm not aware of any insurer that would even back a determination made by CEST. And then of course we've had again a legal point there's an area of case law called reach leality of obligation which is part of the whole status case law and it's a fundamental point when you're considering someone's employment status or IR35 status and it's been completely omitted from the CEST tool, we've had recent cases particularly there was the case with the Professional Referees Association whereby it reinforced that HMRC's interpretation of this area of law was wrong and that really it should be in the CEST tool. So until they actually fix the tool in line with the law then you could argue that anyone using that tool, if they did just on the smallest

amount of research on it, knows that they're using something it's broken and therefore is adhering to reasonable care and if you're not adhering to reasonable care and you're a hiring organisation, when you pass the status determination statement to the agency you don't pass on the tax risk with it so it's just fraught with danger really. What we've seen in the last year when we are helping firms do all their assessments, that particularly with recruitment agencies, they did still have firms that use CEST. I mean not got good branding, it's got that crown on the top which people might tend to trust, but then they were using firms like shield to then double check the assessments that were coming from their clients just to make sure that they were covered.

Deedee: Wow, well we'll be talking more a little bit about tools a bit later in our conversation. In the meantime, Dave, what is the difference between the old IR35 the new IR35 and can you give us a little history here.

Dave: I could talk for a day about the history. So, the original IR35 was based on then inland revenue note number 35 that came out I think it was around November 1999 that indicated that this was going to be a thing. The first intermediary legislation that was brought in in April 2000. Everyone refers to that as IR35, now the new, dare I use the word reform, the legislation is a brand new set of rules and it's a new chapter in the Finance Act. It's not the same as the original legislation. The original legislations still applies If you're a contractor and you'll be working for a small company a new legislation applies If you're a contractor and you're working for a medium or large company. Now there are differences and it's interesting to see actually in the response to the Lords report that the Treasury is still saying that there's really no difference between them except who does the determination and decides on the status. Well that's just fundamentally not true. The tax calculations are different. So whilst, historically, the old legislation, the amount of money that the firm I guess it's set aside to pay the recruitment agency to pay that contractor. If someone was considered inside IR35 you have to take that amount of money, say it's £400 a day and then you would have to reverse out the employment cost, so the employers and I, and that kind of thing and then from that would give you what would consider to be the dean salary. Then from that you have to deduct your your PAYE taxes and also pay your employees and I.

Well that's now changed, so that's still in place for Chapter 8, but the new chapter, chapter 10, the new rules says that the amount of money that the contract is being paid, so this game of £400 must be treated employment income. Now if you treat something as employment income that just means to treat something like salary so permanent employees will understand they get paid a salary every month or you know you might get a job for 50,000 year or something that's your salary. Now an employer, when they pay your salary or employment income, you have to pay employers national insurance which is secondary class, NICs, that's on top of a salary. So, you can't start now in the new era by playing the old rules in the contractors if they're called by chapter 10.

So this is where there is going to be a problem with the transition because if somebody is inside IR35 they're already working via an agency and they're told you're inside, that agency has to stump up another 13.8% to pay on top of that rate, but I'm not going to be able to find that they won't have that money.

So all of the rates need to be re-negotiated because it will need to be taken from the amount paid from the hirer, the amount the agency then uses to pay the contractor and that will have to feature in that, least be accounted for the margins. Well if that's the case then if you're going to re-negotiate with the contractor and this is another pitfall that agencies can fall into. If the contract was on say £400 a day and if the agency now says well we think you're inside IR35 under the new rules, and if the agency says so we have to deduct employers and I from your rate, well that's not actually true, they have to pay out on top and if they start deducting it from that say £400 a day that's known as unlawful deduction it's indirect recovery, a secondary class one, national insurance contributions which is contrary to the Social Security Contributions and Benefits Act. Now in the same way if I hire somebody paid £50,000 year and I've got my employers and I on top of that I can't take it out of that £50,000. There are laws in place where you can't do that. So the whole transitional phase needs to be sought out very very carefully so that firms aren't indirectly recovering taxes from contractors that they actually have no basis in law to do. It's somewhat of a mess - let's say.

Deedee: Well how should recruiters and potentially their clients prepare for the imposition of this into the private sector next April. What must they do and when must they do it?

Dave: Yeah, essentially there's two problems here. So, in terms of when they should do it that all depends up on preparing any contractors that will have contracts that overlap the 6 April 2021. So, if you're an agency now and your place in contractors and maybe they're only on three months engagements then that's only going to take you through to mid-October. But you don't have to worry about that just yet. You only have to start worrying about it when you are going to be starting to engage contractors and their contracts overlap with the 6 April 2021. So, it might be sensible at the moment to not sign any contractors on one year contracts just maybe six months to start with now because let's face at the moment no one's really interested in preparing for IR35 next year. The phone isn't ringing off the hook people asking us to help, I mean we do have some inquiries mainly from very large companies that want to assess hundreds and hundreds of workers, they want to prepare and get the already. But for most companies that have relatively small numbers of contractors they can probably wait until September-October that that's what happened last time and they should have enough time. I would say between now and maybe the end of August they should start educating themselves, just doing some reading and coming up with a rough plan what like to do and when don't really need to get into specifics of details just yet I think this time.

Deedee: Let me ask you this real quickly, do you think that there are enough people out there who prepared for it before this delay was put in place, that the industry in general is in good shape or were people just not ready for this at all even if the delay had not been announced.

Dave: It was completely mixed, it's difficult to give you any percentages on how many were ready and how many weren't. Typically, the larger firms were ready and that we did have some come to us towards the end of the year like in December to get ready. Not surprising

But we managed to do it. So, you have those way in advance. Typically, the finance sector had then you had ones that are all very last minute and it's just quite unbelievable really that people don't prepare about this. But to be fair, I mean no offence to recruiters but they tend to do things at the last minute in a country station and it's not really the thing is it. So we're going to get a rush in January and it's a shame that people aren't necessarily going to prepare earlier than they should because the dress rehearsal essentially last year at the beginning of this year when it should have got in April 2020, it wasn't particularly pretty scene I think that many recruiters and that's why we saw lots of firms have just decide to do blanket determinations or blanket bands f contractors It's a very knee jerk reaction completely have necessary. If they do that then they're going to be less competitive, we've seen with quite a few of the agencies we speak to, they see this as an opportunity, if they can continue to serve their clients with the best talent, with genuine outside the IR35 contracts, they think that will give them a competitive edge yeah I'd agree with that

Deedee: Okay, well do you see any particular steps that they need to be taking once they do get in gear to work on it. What are the basic elements of getting ready for this?

Dave: Okay I think the first thing to the recruitment agency is to speak to their clients first and simply ask the clients, the hiring firm, what are your plans with this? What are you going to do? Sometimes that response will be what do you think we should do? In which case they'll need to advise them. If the client is one of those ones whereby, they're not going to engage with the legislation they're not interested, everyone on payroll then at least they know that so they can warn them of the of the consequences and help that client prepare for what might be a crisp place for them as they approach the end of March next year. So, I think that they definitely need to speak to their clients. If the clients are running an assessment regime and they decide to engage with the legislation, then they need to have trust in any assessments that come down the pipeline because one really cruel aspect of this legislation and none of us understand why, well, we sort of understand why is there but we all think it's completely unfair and I know that the agency sector lobbied hard to this as did I directly to Jessie Norman's face when I met him at the Treasury is that at the moment you can have a hiring firm make a decision and say the contractors outside IR35 give a status determination statement to an agency and the hiring firm has no tax risk it's all passed essentially to the agency assuming that they've taken reasonable care so you can have a hiring firm that's taken reasonable care provided the agency with an outside determination and the agency has the tax risk and they're not even they're not even involved with that contractor working with that client. How do they know that contractors in few weeks' time is going to be treated differently by the client in such a manner that might bring them inside IR35. Suddenly have a stress themselves they're not in control of that, they just set up the original hire. So, there's an area of the legislation that agencies really need to be careful with.

Deedee: Is there any remedy to that?

Dave: Well the simple answer would be to say to the hiring firm, if you assess somebody inside IR35 of course past the determination to the agency so the agency can cost of the contractor, the contractor can then invite the dispute resolution process if they want to.

That's what this the inside one if it's told inside, has to pass down the chain, but there is no legal obligation on the clients to pass down an outside determination to the agency it's only when they passed back to the agency says the agency about the risk. So the agency could ask and say to the client well if you are going to hire contractors and outside basis and you're doing your own assessment don't send me in STS and if you do unidentified me for the tax risk because you're taking the risk, not me. So that's one way that it could potentially work, but again that tends to go against how agencies have operated in the past which is to have a nice, to give firms a nice arm's length relationship identify of them any problems that go wrong with tax This might be one of those instances where possibly a car about these to be put in those contracts so that firms take on the liability for their own risk. I think that's actually the intention of the legislation, but whether or not agencies and clients would agree to do it that way I'm not sure.

Deedee: You mentioned Jesse Norman a minute or two ago, Jesse Norman has been telling everyone that the implementations of IR35 in the public sector was a great success. What's your inside into how it actually worked?

Dave: Crikey, where do we start? So the claim by the Treasury that it's been a great success It's based on two factors. One is that they claim that they raise around about half of £1,000,000,000 worth of extra tax receipts. Now whilst that claim itself can't really be directly attributed to this particular tax measure because the ABR don't have that level of granularity when they come to do that measurements and we know this because we know it's all over the place and ask for a couple of models and all sorts of things and how they go about doing on this. They simply don't have that level of granularity. So, whilst the tax receipts may have gone up by the claims. It can't be directly attributable to the legislation, it can only be compared to perhaps the previous year, and even then whilst there was a essentially a tax cashflow advantage because contractors were now paying tax on the PAYE they would have lost all of the tax that they would have got later stages, due to maybe different tax and the self-assessment. So the numbers don't really add up and no one really knows financially whether it's a success for them and you don't know how to measure the cost of a certain deciding not to hire contractors if they work offshore it's just impossible to measure essentially the butterfly effect of bringing in the legislation. The same will happen with the when they roll out to the private sector, no doubt they will claim success and come up with some numbers but really everyone needs to take them with a pinch of salt. So that's one reason why they thought it was successful. The second reason was that they commissioned a report and by very reputable firm to be done, I think it was about six weeks or a couple of months of when the legislation went it in. Now that particular report we have FOI'd that heavily and it was selectively commissioned which means if you don't ask to look in certain places then you don't find anything. So, you often see the Treasury might claim we found no evidence to support blah blah blah, well the reason they found no evidence because they didn't look. It doesn't mean there wasn't any evidence and the phrase there would be the absence of evidence doesn't necessarily mean there's evidence of absence. So yeah, we just have to take everything with a pinch of salt that comes out of treasury that supports there was a success.

I can tell you that in the response to the Lords report I saw today, they have said that they need to roll out the reforms to the private sector night for 2021 because I'm using this as

justification, otherwise they might start to see the beginning or problems in the public sector of hiring due to the disparity of the tax regime. Well that's just silly because that problem would have happened three years ago and it did happen, it was very difficult for public sector to hire and they had to pay more money for contractors. So they basically said we need to level the playing field we're not going to, we want to roll forward and we don't want to roll back because they don't have to change anything once they put something place that's it So sort of an admission that everything went wrong really. But the way I'd take that is you shot someone in one leg and they're limping down the road while to fix that you're shooting the other leg

Deedee: Well Dave we've only got a few minutes left but tell us about the solutions that you have got to help our recruiters maybe even employers out there do things right, in this on-going battle.

Dave: In short, we've built this solution called IR35 Shield, it's been running a few years now. I originally built in online test status about 10 years ago and we will rebuild this, we've been dealing with hundreds of firms like thousands and contractors to help them get their status assessments accurate. Our belief is that the most fundamental thing that firms need to get right is their compliance and that means absolutely accuracy when it comes to making it in termination about someone status

So, we're very much trying to help firms get the assessment right and also make sure that if they say the assessment is outside to start with and it continues to be outside you asked me earlier what's one of the differences between the original legislation and the new legislation. One of the fundamental differences is under the old legislation, after all the events have taken place you have to then determine the status we're now in a bizarre situation where before the events take place we have to look into our crystal balls and work out whether anyone is going to be inside or outside IR35 over the course of the contract. Well what else we can do in an assessment which is essentially an estimate of what's going to happen. We need to make sure that that still in place so there needs to be some sort of ongoing compliance activity for all of those contractors who are hired on an outside basis and they need to be some protection so that in six year's time if HMRC knock on the door you've got the evidence to prove that what you said it was is actually the case. Because the contract might not be around at that point and if you're the recruitment agency you're the one carrying the can, so that's what we're focused on very much a compliant activity to keep people on the road and make sure that they don't have any accidents when it comes to compliance.

Deedee: I understand also have a book out on this?

Dave: I do, it's funny enough I actually wrote this book and then I published it and this was in March and about two days later we had a delay for a year. So I updated the book it's on Amazon at the moment, It's called *IR35 & Off-Payroll – explained*. It's about 380 pages of people want a hard copy They need to go to Amazon the next few days we are going to give away the book for free a digital copy and if they want that they can come to IR35 and they'll be a place where they can download it. So, we're keen to educate the entire market so they



can understand what they need to do to correctly engage with contractors so yeah we are just going to try and educate and give the book away

Deedee: That's terrific. Dave Thank you so much for giving us all this insight into this very difficult legislation that just seems to continue to get difficult and never eases up does it. Thank you for being with us today on Recruiter Reveals All. We'd like to thank IR35 Shield for being our sponsor I'm Deedee Doke Editor of *Recruiter* magazine Recruiter.co.uk and thanks to our producer Deniz Arslan.

Deedee: Good day